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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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12 U.S. EQUAL EMPLOYMENT
13 OPPORTUNITY COMMISSION,
14 Plaintiff,
15 v.
16 PC IRON, INC. d/b/a PACIFIC COAST
17 IRON, INC.,
18 Defendant.
19

Case No.: 16-CV-2372-CAB(WVG)

**ORDER FOLLOWING DISCOVERY
CONFERENCE**

20 The Court convened a telephonic discovery conference on October 5, 2017 and
21 heard argument on multiple discovery disputes. Attorney Ross Poole appeared for
22 Defendant, attorney Connie Liem appeared for Plaintiff EEOC, and attorney Mehrdad
23 Bokhour appeared for Intervener Elsa Perez. Having heard argument and considered the
24 parties' written submissions, the Court rules as set forth below.¹
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28 ¹ The Clerk of Court is directed to file the parties' written submissions.

1 **1. CEO Anderson’s Physical Presence at Intervener Perez’s Deposition**

2 In light of Plaintiff’s counsel’s representations describing Perez’s recent and
3 ongoing medical issues, which impact her physically and mentally, the Court finds it
4 appropriate to establish reasonable accommodations in order to allow Perez’s deposition
5 to occur such that all parties’ interests are protected. The Court accordingly enters the
6 following conditions and terms upon the taking of Perez’s deposition pursuant to its
7 authority under Federal Rule of Civil Procedure 26(c)(1)(B) & (E).² Should Defendant
8 continue to wish to depose Perez, the following terms and conditions shall govern:

9 a. Anderson shall arrive before Perez’s arrival at the facility where the
10 deposition is to be taken. Anderson shall occupy a room other than the room where Perez’s
11 deposition is to be taken and close the door. Anderson shall remain in that room with the
12 door closed for the duration of the time Perez is on the premises.

13 b. The room in which Anderson will remain shall be equipped with one-way
14 videoconferencing equipment that streams both the audio and video of the deposition to
15 Anderson in real time with sufficient quality and clarity to allow both Anderson and
16 counsel to meaningfully participate.

17 c. Defense counsel may wear a telephone-connected headset with a direct link
18 to Anderson, who may communicate with counsel via headset. Defense counsel may take
19 as many breaks he deems necessary to confer with Anderson—both via headset and in
20 person outside of the deposition room.

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24 ² The Rules expressly permit the Court to order that a “deposition be taken by telephone or
25 other remote means.” Fed. R. Civ. P. 30(b)(4); *see also Kaseberg v. Conaco, LLC*, 2016
26 U.S. Dist. LEXIS 111767, at *15-18 (S.D. Cal. Aug. 19, 2016) (Bartick, J.) (permitting
27 videoconference deposition to save expense on travel costs); *Lopez v. CIT Bank, N.A.*, 2015
28 U.S. Dist. LEXIS 176575, at *5 (N.D. Cal. Dec. 18, 2015) (same); *Balu v. Costa Crociere*
S.P.A., 2011 U.S. Dist. LEXIS 85299, at *4 (S.D. Fla. Aug. 3, 2011) (noting “depositions
are now readily taken inexpensively by internet video (e.g., Skype) or through somewhat
more expensive, but still efficient, video conferencing facilities.”).

1 d. The cost of the accommodations above shall be borne by Plaintiff EEOC,
2 Intervener Perez, or both. The EEOC and Perez may allocate the costs amongst themselves
3 in whatever fashion they agree.

4 Defendant's argument that Anderson is being excluded from the deposition is
5 unfounded. With the above electronic accommodations, Anderson will be "virtually"
6 present in the deposition room as closely as practicality and the competing circumstances
7 allow. He may listen to Perez's testimony as though he were in the same room. He may
8 visually observe Perez as though he were in the same room. He may communicate with
9 his attorney as though he were sitting next to counsel. And counsel may leave the
10 deposition room and confer with Anderson if necessary.

11 Counsel's concerns over his potential inability to conduct the deposition with
12 Anderson speaking in his ear is also unfounded. Even if Anderson were in the same room,
13 counsel would necessarily break from questioning to confer with Anderson if Anderson
14 were to whisper in his ear. Counsel would not forge on with questioning with Anderson
15 whispering to him; he would take a break and listen to Anderson. Thus, there is no
16 meaningful difference with respect to this concern between Anderson being in the same
17 room or in another room while communicating with counsel. The conditions above allow
18 Anderson full and meaningful participation in Perez's deposition while also providing
19 some accommodations for Perez.

20 Defendant's argument that the Court's Order will set a precedent for excluding
21 Anderson from trial in this case is also unfounded. This Court's Order applies to the limited
22 context of Perez's deposition. This Order in no manner binds The Honorable Cathy A.
23 Bencivengo at trial. As defense counsel acknowledged, the environment of a deposition is
24 materially different than inside a courthouse, where a judicial officer provides oversight
25 and possibly comfort to Perez. Simply stated, this Court's Order has zero bearing on
26 whether Anderson will or will not be able to attend the trial in this case, which is a wholly
27 separate proceeding than a deposition.
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1 **2. Depositions of Angel Lopez and Anjelea Lopez**

2 The Court is satisfied that Angel Lopez and Anjelea Lopez are properly subject to
3 deposition in this case. Based on the detailed discussion with the parties on the record,
4 Plaintiff's objection to these depositions is OVERRULED.

5 **3. (a) Plaintiff's Request for Production of Documents (Set One) No. 4—**
6 **Anderson's Notes;**

7 **(b) Plaintiff's Request for Production of Documents (Set One) No. 4—**
8 **Defendant's Financial Records From 2011 and 2012; and**

9 **(c) Plaintiff's Request for Production of Documents (Set Two) No. 18—PC**
10 **Iron's Current Financial Records**

11 The Court declines to entertain these untimely discovery disputes. The Court's
12 Chambers Rules clearly require that such disputes be presented to the Court for
13 consideration within 30 days of the disputes arising. This requirement is also reiterated in
14 the Scheduling Order issued in this case. (Doc. No. 11 at ¶ 7 ("All disputes concerning
15 discovery shall be brought to the attention of the Magistrate Judge no later than thirty (30)
16 days following the date upon which the event giving rise to the discovery dispute
17 occurred.")) Additionally, Plaintiff's counsel is counsel of record on several cases pending
18 before the Court, one of those cases is well into the discovery process, and that case has
19 included a discovery dispute before this Court.³ Plaintiff's counsel should have been
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21 ³ At the April 14, 2017 Case Management Conference in this case, the Court advised the
22 parties to immediately meet and confer once disputes arise and bring them to the Court's
23 attention quickly if meet and confer efforts did not resolve the dispute. Moreover,
24 Plaintiff's counsel in this case is also lead counsel in *U.S. Equal Employment Opportunity*
25 *Commission v. CJMBS Pharmacies, Inc. et al.*, 16-CV-2410-MMA(WVG). When counsel
26 participated in the March 23, 2017 Case Management Conference in that case, the Court
27 concluded by expressly advising the parties: "If you bring a dispute to me that's more than
28 30 days old, then I'm not going to entertain it." Accordingly, Plaintiff's counsel has
personally been on notice that failure to comply with the Court's 30-day deadline would
lead to the result the Court reaches today. It is immaterial that the Court did not expressly
warn Plaintiff's counsel in the instant case. The Court had expressly warned counsel a few

1 familiar with the 30-day submission policy in the Chambers Rules and expressly stated in
2 the Scheduling Order in this case. Counsel should also have been aware that the Court
3 would not consider untimely disputes given the express admonition to that affect in the
4 *CJMBS Pharmacies* case. Counsel nonetheless elected to not comply with the Court's
5 explicit rules and orders, failed to heed the Court's admonition, and assumed the risk that
6 the Court would follow through and enforce its rules.

7 Here, all three RFP disputes are untimely. With respect to RFP No. 18, the parties
8 did not notify the Court of its existence until 40 days after the 30-day deadline had expired
9 on August 17, 2017.⁴ With respect to the dispute over Defendant's financial records from
10 2011 and 2012, which Plaintiff claims are responsive to RFP No. 4, the parties first notified
11 the Court of its existence 105 days after the 30-day deadline expired.⁵ Finally, with respect
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13 weeks before the Case Management Conference in this case, counsel's knowledge of the
14 Court's procedures transferred to the instant case, and that knowledge is properly imputed
15 to Plaintiff through counsel. *See generally Link v. Wabash R.R. Co.*, 370 U.S. 626, 633
16 (1962); *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1523 (9th Cir. 1990)
17 ("A plaintiff cannot avoid dismissal by arguing that he or she is an innocent party who will
18 be made to suffer for the errors of his or her attorney. The established principle is that the
19 faults and defaults of the attorney may be imputed to, and their consequences visited upon,
20 his or her client.") (citations omitted); *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89,
21 92 (1990) (service on attorney constitutes notice to clients); *Cnty. Dental Servs. v. Tani*,
22 282 F.3d 1164, 1168 (9th Cir. 2002) ("Under this circuit's precedent, a client is ordinarily
23 chargeable with his counsel's negligent acts.").

24 ⁴ Defendant served its response to RFP No. 18 on July 13, 2017. The response
25 unequivocally stated that Defendant would "not comply with this request" based on the
26 objections specified in the response. Given this firm declination to provide the documents,
27 the 30-day clock began to run on July 13, 2017 and expired on August 12, 2017. The
28 parties first presented this dispute to the Court on September 21, 2017—40 days late—
through a joint telephone call to the undersigned's chambers.

⁵ Defendant served its RFP No. 4 response on May 9, 2017. The RFP had asked for "all
documents" related to Defendant's claim that Perez was "laid off." The RFP singled-out
and specifically referenced paragraph 27 of Defendant's Answer, which made no mention
of financial records or low business volume as the basis for Perez's layoff. Defendant

1 to the dispute over Anderson’s personal notes, the parties missed the 30-day deadline by
2 four days.⁶ Accordingly, all three disputes are untimely and, as such, the Court will not
3 entertain them.

4 Lest one misconstrue this result as unjust or draconian, the assignment of blame
5 rightfully rests with the party that chose to ignore the Court’s clearly-established and
6 clearly-communicated rules and policies. If rules and orders are to mean anything, they
7 must be enforced. This basic tenet of the practice of law is emphasized from the very
8 beginning of attorneys’ careers in law schools across the country. Even before they are
9 attorneys, law students are admonished to either strictly abide by deadlines or seek
10 extensions from the courts. Common sense dictates that doing neither of these is not an
11 option or a choice that will end well—especially when the judge expressly informs the
12 attorneys of the consequences. Attorneys ignore court-imposed rules and deadlines at their
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16 accordingly had no reasonable expectation that this RFP requested financial documents.
17 But Plaintiff, as the proponent of the RFP, surely knew what this RFP contemplated, as
18 counsel now contends Defendant’s financial documents are indeed responsive. (See
19 Plaintiff’s Discovery Statement at 7 (“Plaintiff also contends that Defendant’s financial
20 records are responsive to RFP 4 because they reflect Defendant’s financial condition and
21 low sale volume in late 2011-2012”).) Thus, when Plaintiff received Defendant’s
22 response to this RFP on May 9 and discovered the absence of financial records from 2011
23 and 2012, the dispute arose, and the 30-day deadline began to run, on that date.
24 Accordingly, the deadline expired on June 8, 2017. Plaintiff first raised the dispute with
25 Defendant on September 7, 2017. The parties first presented this dispute to the Court on
26 September 21, 2017—105 days late—through the same joint telephone call mentioned
27 above.
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6 Defendant served its response to RFP No. 4 on May 9, 2017. The 30-day timeline
ordinarily would have begun to run on that day with respect to the dispute over Anderson’s
notes. However, Plaintiff did not learn of the notes’ existence until Anderson’s deposition
on August 18, 2017. Thus, the timeline began to run on that date and expired on September
17, 2017. The parties first presented this dispute to the Court on September 21, 2017—4
days late—through the same joint telephone call mentioned above.

1 peril and at the peril of their clients. Indeed, the Ninth Circuit Court of Appeals has long
2 expressed and endorsed this basic concept in the practice of law:

3 [T]he district court needs the authority to manage the cases
4 before it efficiently and effectively. In these days of heavy
5 caseloads, trial courts in both the federal and state systems
6 routinely set schedules and establish deadlines to foster the
7 efficient treatment and resolution of cases. *Those efforts will be*
8 *successful only if the deadlines are taken seriously by the parties,*
9 *and the best way to encourage that is to enforce the deadlines.*
10 *Parties must understand that they will pay a price for failure to*
comply strictly with scheduling and other orders, and that failure
to do so may properly support severe sanctions and exclusions of
evidence.

11 *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2004) (emphasis
12 added); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992)
13 (“A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly
14 disregarded without peril.”) (internal quotations and citation omitted).

15 As the Ninth Circuit stated, Plaintiff’s counsel here risked paying a quite predictable
16 price for failing to comply with the 30-day deadline she should have been aware of based
17 on her experience with this Court, this Court’s Chambers Rules, and the Scheduling Order
18 issued in this case. By not complying with these directives, she assumed the risk that
19 today’s predictable result would follow and cannot credibly begrudge the Court for
20 enforcing a rule that the Court has warned would be enforced in this manner.

21 **4. Plaintiff’s Request for Production of Documents (Set Two) No. 17—Employee**
22 **Files of Vanessa Lopez**

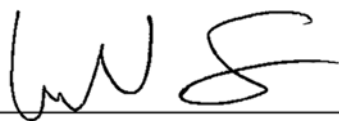
23 Defendant’s objections are SUSTAINED. Defendant hired Vanessa Lopez roughly
24 five to six years after Perez ceased working at PC Iron. The Court finds Lopez is not an
25 appropriate comparator in this case given this remoteness between her employment and
26 Perez’s employment. *See Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294 (E.D. Cal.
27 2016) (stating that to “be considered similarly situated, the class of one challenger and his
28 comparators must be prima facie identical in all relevant respects or directly comparable in

1 all material respects.’”) (quoting *U.S. v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008)); *see*
2 *also Bryant v. Aiken Reg’l Med. Ctrs., Inc.*, 333 F.3d 536, 546 (4th Cir. 2003) (concluding
3 that employee identified by defendant as similarly situated to plaintiff to rebut inference of
4 discrimination in defendant’s failure to hire plaintiff, was not similarly situated to plaintiff
5 where the employee “was not hired until several months after Bryant filed charges of racial
6 discrimination”); *Lee v. Kansas City So. Ry.*, 574 F.3d 253, 259 (5th Cir. 2009)
7 (“Employees . . . who were the subject of adverse employment actions too remote in time
8 from that taken against the plaintiff generally will not be deemed similarly situated.”);
9 *Tibbs v. Calvary United Methodist Church*, 505 Fed. Appx. 508, 515-16 (6th Cir. 2012)
10 (concluding that “comparators were not similarly situated in that there is no temporal nexus
11 to the events here” when disciplinary decisions concerning comparators were seven months
12 to two years removed from plaintiff’s termination); *Swann v. US Foods, Inc.*, 2015 U.S.
13 Dist. LEXIS 78665, at *27 (E.D. Va. June 17, 2015) (five to ten year span too remote);
14 *Hurst v. Dist. of Columbia*, 2015 U.S. Dist. LEXIS 33623, at *21 (D. Md. Mar. 16, 2015)
15 (five year span too remote); *Epps v. First Energy Nuclear Operating Co.*, 2013 U.S. Dist.
16 LEXIS 41140, at *60 (W.D. Pa. Mar. 25, 2013) (four-and-a-half-year span too remote).

17 The parties shall proceed in a manner not inconsistent with this Order.

18 **IT IS SO ORDERED.**

19 DATED: October 11, 2017

20 
21 Hon. William V. Gallo
22 United States Magistrate Judge
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